C Vignesh Kumar a/l Chellapah & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05-221-04 OF 2018
MOHTARUDIN BAKI, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
19 JULY 2019

Civil Procedure — Appeal — Appeal against decision of High Court judge — Appellants applied to be at liberty to attend before court to show why property should not be forfeited and to be declared as bona fide third parties — High Court judge dismissed application on grounds that it should be made in sessions court — Preliminary objection raised by deputy public proscutor — Whether appeal competent — Whether appeal did not comply with s 50 of Courts of Judicature Act 1964 — Whether appeal academic — Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 61

This was an appeal from the decision of the learned High Court judge who dismissed the appellants' joint application for the following main relief: (a) that they be at liberty to attend before the court to show cause why the property in the Schedule to Federal Government *Gazette* PU(B) 53 should not to be forfeited; and (b) be declared as bona fide third parties within the meaning of s 61 of Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). The first appellant was acting as counsel for, whilst the second appellant was the legal advisor of Syarikat Noradz Travel & Services Sdn Bhd ('Noradz') who was charged, with three other persons, in the session court for offences under the Act as well as under the Banking and Financial Institutions Act 1989. These accused persons had been found guilty by the learned sessions court judge and sentenced accordingly. The properties of Noradz had earlier been seized and forfeited under s 55 of the Act. The first appellant claimed that his legal and professional fees incurred whilst acting for Noradz had not been paid. The second appellant claimed that his salary had also not been paid. Thus, they both filed the said application to be allowed to present their claims which they contended ought to be paid to them from the forfeited property. The learned High Court judge dismissed the said application without hearing its merits because His Lordship was of the view that it should had been made in the session court first. Hence, this appeal. At the hearing of the appeal against the said decision, the learned deputy public prosecutor raised a preliminary objection on the following grounds: (i) that the appeal was not competent; (ii) that the appeal did not comply with s 50 of the Courts of Judicature Act 1964; and (iii) that the appeal was academic.

Held, allowing the preliminary objection; dismissing the appeal and affirming

the decision of the learned High Court judge:

(1) Although the application was not filed and the decision made was not in the course of a trial, nevertheless it did not finally dispose of the rights of the appellants because the order of the learned High Court judge was only to direct that the application be filed in the session court. The learned High Court judge did not dismiss the application outright and therefore there was no final determination of the appellants' right by the court for that was being kept at abeyance until the disposal of it by the session court. The appellants had the option to apply for their application to be heard before a different session court judge if there existed a fear that this judge had already made up his mind on the issue given his earlier decisions (see paras 7–9).

(2) The reasons of preservation of the appellants' rights and avoidance of laches simply could not stand as a ground to allow the appeal to go on because the simple and obvious fact was that the appellants had submitted themselves to the jurisdiction of the sessions court. Having done so, the full consequence of that action would be the litigation of that right not just in the sessions court but further to the High Court and before this court on appeal. Thus their rights to be heard by all three tiers of the courts, as rightly conceded by them, had indeed been preserved (see para 10).

[Bahasa Malaysia summary

Ini adalah rayuan daripada keputusan hakim Mahkamah Tinggi yang bijaksana yang menolak permohonan bersama perayu untuk relif utama berikut: (a) bahawa mereka bebas untuk hadir di hadapan mahkamah untuk menunjukkan sebab mengapa harta dalam Jadual kepada *Warta* Persekutuan Kerajaan PU(B) 53 tidak boleh dilucuthak; dan (b) diisytiharkan sebagai pihak ketiga bona fide dalam pengertian s 61 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta'). Perayu pertama bertindak sebagai peguam kepada, sementara perayu kedua adalah penasihat undang-undang Syarikat Noradz Travel & Services Sdn Bhd ('Noradz') yang didakwa, bersama tiga orang lain, dalam mahkamah sesyen untuk kesalahan di bawah Akta juga di bawah Akta Bank dan Institusi-Institusi Kewangan 1989. Orang yang dituduh didapati bersalah oleh hakim mahkamah sesyen yang bijaksana dan dihukum dengan sewajarnya. Harta Noradz telah dirampas dan dilucuthak di bawah s 55 Akta. Perayu pertama mendakwa yuran perundangan dan profesionalnya yang ditanggung semasa mewakili Noradz tidak dibayar. Perayu kedua mendakwa gajinya juga tidak dibayar. Oleh itu, kedua-dua mereka memfailkan permohonan tersebut supaya dibenarkan mengemukakan tuntutan mereka yang mereka harus dibayar kepada mereka daripada harta yang telah dilucuthak. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan tersebut tanpa mendengar merit kerana Yang Arif berpendapat bahawa ia

sepatutnya dibuat di mahkamah sesyen dahulu. Oleh itu, rayuan ini. Pada pendengaran rayuan terhadap keputusan tersebut, timbalan pendakwa raya yang bijaksana menimbulkan bantahan awal atas alasan berikut: (i) bahawa rayuan itu tidak kompeten; (ii) bahawa rayuan itu tidak mematuhi s 50 Akta Mahkamah Kehakiman 1964; dan (iii) bahawa rayuan itu adalah akademik.

Diputuskan, membenarkan bantahan awal; menolak rayuan dan mengesahkan keputusan hakim Mahkamah Tinggi yang bijaksana:

(1) Walaupun permohonan itu tidak difailkan dan keputusan yang dibuat tidak dalam proses perbicaraan, namun ia tidak akhirnya melupuskan hak-hak perayu kerana perintah hakim Mahkamah Tinggi yang bijaksana hanya untuk mengarahkan permohonan itu difailkan dalam mahkamah sesyen. Hakim Mahkamah Tinggi yang bijaksana tidak menolak permohonan itu secara terang-terangan dan oleh sebab itu tidak ada penentuan akhir hak-hak perayu oleh hakim yang selama ini dipertahankan sampai pelupusannya oleh mahkamah sesyen. Perayu mempunyai pilihan untuk memohon permohonan mereka untuk didengar di hadapan hakim mahkamah sesyen yang berlainan jika terdapat ketakutan bahawa hakim ini telah membuat keputusannya mengenai isu tersebut dengan keputusannya yang lebih awal (lihat perenggan 7–9).

(2) Sebab-sebab pemeliharaan hak-hak perayu dan penghindaran laches semata-mata tidak dapat menjadi alasan untuk membenarkan rayuan diteruskan kerana fakta yang mudah dan jelas adalah bahawa perayu telah menyerah diri kepada bidang kuasa mahkamah sesyen. Setelah berbuat sedemikian, akibat penuh tindakan itu akan menjadi litigasi hak itu bukan hanya di mahkamah sesyen tetapi terus ke Mahkamah Tinggi dan di hadapan mahkamah ini atas rayuan. Oleh itu, hak-hak mereka untuk didengar oleh ketiga-tiga peringkat mahkamah, sebagaimana yang diakui oleh mereka, memang telah dipelihara (lihat perenggan 10).]

Cases referred to

PP v Tan Tatt Eek & Other Appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)
Totti Trading v PP [2018] 5 MLJ 683; [2017] 1 LNS 1913, CA (distd)

Legislation referred to

Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 44, 55, 56, 61, 61(4)
Banking and Financial Institutions Act 1989
Courts of Judicature Act 1964 ss 3, 50, 50(1)

Appeal from: Criminal Revision No WA-44–12–01 of 2018 (High Court, Kuala Lumpur)

PG Cyril (Daniel Annamalai a/l N Subramaniam with him) (Vignesh Kumar & Assoc) for the appellant.
Tetralina bt Ahmd Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

[1] This appeal before us arose from the decision of the learned High Court judge who dismissed the appellants' joint application for the following main relief; that is:

> that they be at liberty to attend before the Court to show cause on the date to be fixed why the property in the Schedule to Federal Government Gazette PU(B) 53 dated 13.2.212, should not to be forfeited;

and be declared as bona fide third parties within the meaning of s 61 of the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). The first appellant was acting as counsel for, whilst the second appellant was the legal advisor (employee) of Sykt Noradz Travel & Services Sdn Bhd ('Noradz') who was charged, with three other persons, in the sessions court for offences under the Act (s 4(1)) as well as under the Banking and Financial Institutions Act 1989 ('the BAFIA'). These accused persons had been found guilty by the learned sessions court judge and sentenced accordingly. The properties of Noradz had earlier been seized and forfeited under s 55 of the Act and that order was *gazetted* vide the notification as stated above. The first appellant claimed that his legal and professional fees incurred whilst acting for Noradz in the High Court appeal and in the subsequent appeal and review application filed in this court amounting to RM1,539,800 has not been paid. The second appellant in turn claimed that his salary for November 2012 until the date of the application, that is, 28 January 2018 at RM12,500 per month have also not been paid. The total amount outstanding then was RM775,000. Thus, they both filed the said application to be allowed to present their claims which they contended ought to be paid to them from the forfeited property as they were, as stated earlier, both bona fide third parties under s 61(4) of the Act.

[2] The learned High Court judge dismissed the said application without hearing its merits because His Lordship was of the view that it should have been made in the sessions court first. He alluded to an earlier application filed by Noradz's previous counsel for their fees amounting to RM4.5m which was rejected by the learned sessions court judge but which decision was reversed by His Lordship on appeal. Filing the application straight away to the High Court was an abuse of the court's process, held His Lordship further.

[3] At the hearing of the appeal against the said decision before us, the learned deputy public prosecutor ('DPP') raised a preliminary objection on the following grounds:

(i) that the appeal was not competent;

(ii) that the appeal does not comply with s 50 of the Courts of Judicature Act 1964 ('the CJA'); and

(iii) that the appeal was academic.

Issues (i) and (ii) are related and would be considered together.

INCOMPETENT APPEAL

[4] Section 50(1) of the CJA provides as follows:

> Section 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court.

Decision on the other hand has been defined in s 3 as follows:

> Section 3 Decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[5] Steve Shim CJ (Sabah and Sarawak) in *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685 at pp 710–711; [2005] 1 CLJ 713 at p 747 gave this guidance on how the courts should interpret statutes:

> The primary duty of the court is to give effect to the intention of the Legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such cases best declared the intent of the law giver (see *Bindra's Interpretation of Statutes* (8th Ed)).

[6] It is clear from the said definition in s 3 that there are two instances when a decision of the High Court is not appealable. The first is if it is made in the course of a trial and the second is when the hearing of the cause or matter does not dispose of the rights of the parties with finality. The clear intention of the Legislature expressed from the words used in the aforesaid section is to filter matters that can go up on appeal. In other words, a cap has been placed by the Legislature to ensure that appeals filed are not frivolous and there would not be

undue delay in the disposal of trials by reason of such appeals being filed. Therefore, even though the order of the court was not made in the course of the trial, but if it does not dispose of the rights of the parties with finality, that decision is still unappealable, that is say, there is no automatic right of appeal for such a decision made by the court. To say otherwise would run afoul of the clear intention of the Legislature as expressed in the said s 3, which as we had stressed earlier, is to filter matters which can be further taken up on appeal before us.

[7] Thus, in this case although the application was not filed and the decision made was not in the course of a trial, nevertheless it does not finally dispose of the rights of the appellants because the order of the learned High Court judge was only to direct that the application be filed in the sessions court where as rightly pointed out by the learned High Court judge, the source for payment of the claim, that is, the forfeited property was.

[8] It is obvious that the learned High Court judge did not dismiss the application outright and therefore there is no final determination of the appellants' right by the court for that was being kept at abeyance until the disposal of it by the sessions court. This case is distinguishable from a similar one heard by this court, that is *Totti Trading v Public Prosecutor* [2018] 5 MLJ 683; [2017] 1 LNS 1913 cited by the appellants before us because in the cited case, the forfeiture order was made against the appellant by the High Court upon application by the public prosecutor under s 56 of the Act and it was only some five years later upon discovery of the order that the appellant filed the application to the High Court to set it aside. Coincidentally, it was the same learned High Court judge as in this case before us that heard the application. The learned High Court judge held that he had no jurisdiction to set aside the forfeiture order made earlier by a different High Court judge and that the only course open to the appellant was to appeal as he could not exercise his inherent powers to set aside the forfeiture order. That decision was reversed by this court who held that indeed he had such inherent powers. From that brief narration of the facts above, and with respect to learned counsel for the appellants, the ratio is not applicable to us in this case as there was no issue about the High Court exercising its inherent jurisdiction for obviously, unlike the cited case, the forfeiture order was not made by that court but by the sessions court.

[9] Learned counsel for the appellants has another take on this issue. He submitted that the sessions court judge (Tn Mat Ghani bin Abdullah) in this case was functus officio because he had heard similar claims by investors in Noradz and other counsel who acted for the accused persons. He did not allow their claims but instead ordered the forfeiture. The sessions court judge, he submitted has therefore taken a position in making a ruling in the issue and by doing so has already completed his task on the forfeiture of Noradz's assets.

Therefore, the appellants could not go back to the said court, he said further. Again with respect, we have to disagree with learned counsel for the learned sessions court judge may be functus officio in respect of claims filed by the earlier claimants but not fresh claims made by the appellants. The appellants have the option to apply for their application to be heard before a different sessions court judge if there exists a fear that this judge had already made up his mind on the issue given his earlier decisions. This consideration brings us to the second ground of decision.

ACADEMIC APPEAL

[10] Following the dismissal of the appellants' application by the learned High Court judge, the appellants did file their application before the session court. Their application was dismissed and the matter was brought up on appeal to the High Court. At the time of the hearing of this appeal before us, that appeal in the High Court was still pending. Therefore, submitted the learned DPP, this appeal before us was academic. Learned counsel for the appellants however said their filing of the application in the session court was merely to preserve the rights of their clients and to avoid being accused of laches. Besides, he further submitted, there was still a live issue before the court, which is the jurisdiction of the High Court to hear the application. That issue of jurisdiction has been dealt with by us earlier and as for the preservation of his clients' rights and avoidance of laches, these reasons simply could not stand as a ground to allow the appeal to go on because the simple and obvious fact is that the appellants had submitted themselves to the jurisdiction of the sessions court. Having done so, the full consequence of that action would be the litigation of that right not just in the sessions court but further to the High Court and before this court on appeal. Thus their rights to be heard by all three tiers of the courts, as rightly conceded by them, had indeed been preserved. Issues ventilated before us such as jurisdiction of the court and the usage of s 44 of the Act being the proper section of the Act to use to make the application as decided by the learned High Court judge can still be raised by the appellant, before all three courts if the need arises.

[11] Accordingly, we allowed the preliminary objection of the learned DPP, with the end result that the appeal was dismissed and the decision of the learned High Court judge was affirmed.

Preliminary objection allowed; appeal dismissed and decision of learned High Court judge affirmed.

Reported by Ahmad Ismail Illman Mohd Razali